

# DMV SECRECY: STALKING AND SUPPRESSION OF SPEECH RIGHTS

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It started with a murder.

Robert John Bardo, a high school dropout from Tucson, Arizona, was obsessed with actress Rebecca Schaeffer of the television show, "My Sister Sam." He wrote fan letters and traveled to California to see tapings of the show, but he did not get to meet Schaeffer.<sup>1</sup> Finally, Bardo hired a private investigator in Tucson to find Schaeffer's address. The investigator used California state databases, including one from the Department of Motor Vehicles, and got Schaeffer's address.<sup>2</sup> Bardo went to Schaeffer's neighborhood and, showing her photo, asked people which apartment was hers.<sup>3</sup>

Somewhere along the line, Bardo changed from fan to something else. The *Los Angeles Times* reported that, "[j]ust before his journey to Los Angeles, he wrote his sister in Knoxville, Tennessee, saying: 'I have an obsession with the unattainable and I have to eliminate (something) that I cannot attain.'"<sup>4</sup> Bardo finally found his way to Schaeffer's door. When she answered, he took a .357 magnum and shot her to death. Bardo was convicted and sentenced to life in prison.<sup>5</sup>

Following Schaeffer's murder, California passed a law restricting the dissemination of Department of Motor Vehicle information.<sup>6</sup> Stories involving assaults and murder prompted Virginia to create a similar law.<sup>7</sup> In 1994, Senator Barbara Boxer (D-Calif.), and Representative Jim Moran (D-Va.), sponsored the Driver's Privacy Protection Act ("Act"), part of the omnibus Violent Crime Control

and Law Enforcement Act of 1994.<sup>8</sup> The law is intended to draw a curtain around state motor vehicle records to preserve the privacy rights and protect the lives and property of drivers and their families.<sup>9</sup>

The Act, which takes effect September 13, 1997,<sup>10</sup> will make disclosure of personal information obtained by any department of motor vehicles illegal.<sup>11</sup> Information which could identify a person, including photographs, social security numbers, telephone numbers, addresses and the driver's name falls within the ambit the law.<sup>12</sup> There are exceptions for numerous categories of businesses and academicians and a provision to allow states to provide for broader release of information if they choose to set up mechanisms to give drivers the right to prevent the release of their information.<sup>13</sup> The law does not provide for press or general public access to the information.

This article examines the First Amendment implications of the Driver's Privacy Protection Act. Although federalism and states' rights concerns provide strong constitutional arguments against the nature of the Act, this article remains focused on First Amendment implications. Part I of the article examines the circumstances leading up to the Act's passage, and the provisions it contains that are subject to constitutional scrutiny. Part II examines four main constitutional difficulties involved with imposition of the Act, and specifically analyzes its effect on freedom of the press. This article concludes that the Driver's Privacy Protection Act is an unconstitutional infringement on First Amendment freedoms because it fails

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<sup>1</sup> Stephen Braun & Charisse Jones, *Victim, Suspect From Different Worlds: Actress' Bright Success Collided With Obsession*, L.A. TIMES, July 23, 1989, at A1.

<sup>2</sup> *Id.* at A38.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Eric Malnic, *Man Who Killed TV Actress Gets Life Without Parole*, L.A. TIMES, Dec. 21, 1991, at B3.

<sup>6</sup> CAL. VEH. CODE § 1808.21 (West 1995).

<sup>7</sup> See VA. CODE ANN. § 46.2-208 (Michie 1995).

<sup>8</sup> Driver's Privacy Protection Act of 1994, Pub. L. No. 103-322, 18 U.S.C. §§ 2721-2725 (1994).

<sup>9</sup> See *Statement of Senator Boxer on Enactment of the Driver's Privacy Protection Act*, NEWS FROM U.S. SENATOR BARBARA BOXER, Aug. 30, 1994.

<sup>10</sup> 18 U.S.C. § 2721 (1994).

<sup>11</sup> *Id.* §§ 2721, 2723.

<sup>12</sup> *Id.* § 2725(3).

<sup>13</sup> *Id.* § 2721(b)(1-10).

to provide its intended protection.

## I. BACKGROUND

### A. Passing the Act

Senator Boxer featured the Schaeffer case prominently in press releases explaining her sponsorship of the measure.<sup>14</sup> Senator Boxer also referred to abortion opponents who used license plate information to track down and harass doctors and patients of abortion clinics.<sup>15</sup> Meanwhile, Representative Moran referred to the Schaeffer murder in his testimony about the Act before the House Subcommittee on Civil and Constitutional Rights.<sup>16</sup> In addition, he cited other abuses of motor vehicle records, including the activities of a group of Iowa teenagers who took down the license plate number of expensive cars in order to find the addresses of the vehicles' owners.<sup>17</sup> Armed with the information, they went to the homes and robbed the families.<sup>18</sup> Representative Moran testified, "[in] my own state of Virginia, a woman found out the names of over thirty licensed drivers

by tracing the information through their license plate numbers, claiming she needed the information because the drivers in question were stealing the filings from her teeth."<sup>19</sup>

Various media groups opposed the Boxer-Moran bill claiming that it provided little protection to the public, posed a threat to the media's ability to report on stories affecting public welfare, and would deny the public valuable information about the efficiency and functioning of state and federal governments.<sup>20</sup> Robert Franklin, staff writer for the *Minneapolis Star-Tribune*, wrote about how the news media uncovered, through the use of Minnesota Department of Motor Vehicle records, that men convicted of murder, felony drug possession and armed robbery were getting jobs as Minnesota school bus drivers.<sup>21</sup>

### B. The Act

Title 18, Chapter 123, of the United States Code is entitled "Prohibition on Release and Use of Certain Personal Information from State Motor Vehicle Records."<sup>22</sup> The Act forbids state employees or con-

<sup>14</sup> See, e.g., *Sen. Boxer and Rep. Moran Introduce Bill to Prohibit DMV From Releasing Personal Information*, NEWS FROM U.S. SENATOR BARBARA BOXER, Oct. 26, 1993. Senator Boxer explained that

[i]n 32 states, an individual can access someone's name and address simply by submitting their license plate number and a nominal fee to the DMV. The availability of this information has not gone unnoticed by criminals and others who use it to stalk and initiate unsolicited contact with police officers, women, doctors, attorneys, celebrities and other individuals.

*Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Driver's Privacy Protection Act, 1994: Hearings on H.R. 3365 Before the Subcomm. On Civil and Constitutional Rights, 103rd Cong., 2d Sess. (1994)* (statement of Representative Jim Moran).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> In his testimony in opposition to the Act, Richard Oppel, Washington Bureau Chief for Knight-Ridder Newspapers, recounted similar stories involving the use of motor vehicle records.

In 1991, Marilyn Adams of the Miami Herald documented how the state of Florida had failed in its efforts to keep drunk drivers off the highways. Using DMV records, she found nearly 500 drivers in four counties who each had six or more DUI convictions. Sue Radicki of Pompano Beach was the wife of a house painter. She was not as well known as Rebecca Schaeffer. Ms. Radicki was killed by a convicted drunk driver, driving with a suspended license. It is unfortunate that the Miami Herald's reporter could not have alerted the community before the still-driving drunk drove his car into Ms. Radicki's vehi-

cle. We believe that newspapers and organizations like Mothers Against Drunk Drivers can alert citizens to dangerous drivers when police are overwhelmed but they can only do this if they have access to records.

*Id.* (statement of Richard A. Oppel).

<sup>21</sup> Robert Franklin, *Keeping Open Records Open*, MINNEAPOLIS STAR-TRIB., Feb. 2, 1994, at 12A.

One man's driver's license had been revoked a year earlier. The convictions should have been caught by a computer check, but the state had a backlog of 110,000 criminal records that had not been entered into its computers. Star Tribune reporters found that at least 41 pilots of passenger aircraft had lost their Minnesota driver licenses because of alcohol-related offenses that should have been reported to the Federal Aviation Administration but often were not.

Channel 4's I-Team found that more than 10,000 wrecked or stolen vehicles were brought into Minnesota each year, rebuilt - sometimes dangerously - and given clean titles without inspection. The I-Team helped one woman get back \$15,000 she paid for a rebuilt wreck only to find that it was subsequently sold to another unwary buyer.

The St. Paul Pioneer Press used the records in its investigation of a man who falsely claimed he had Italian banking connections that would finance a \$35 million horse and entertainment center on the city's riverfront.

I used motor vehicle records to show that a charity was pleading for money to buy a refrigerated truck to take food to the poor a few months after it bought a more expensive Mercedes-Benz for its president.

*Id.*

<sup>22</sup> 18 U.S.C. §§ 2721-2725 (1994).

tractors from disclosing or making available "personal information about any individual obtained by the department in connection with a motor vehicle record."<sup>23</sup> The Act backs up this prohibition with criminal sanctions and a civil cause of action for use or disclosure of personal information from motor vehicle records.<sup>24</sup>

However, the Act permits specified uses of personal information from DMV records.<sup>25</sup> The Act also enumerates exceptions based on categories of users as well as categories of uses. The list begins with state agencies and courts or persons and entities acting on behalf of government agencies.<sup>26</sup> It continues with "legitimate businesses" and their agents, employees or contractors where the information is used to verify the accuracy of information submitted to the business and prevent fraud.<sup>27</sup> Other users include insurers who are investigating claims,<sup>28</sup> investigating fraud,<sup>29</sup> or rating drivers,<sup>30</sup> tow truck operators who need to notify owners of towed vehicles,<sup>31</sup> and private investigators who are retained in connection with permissible uses of the information.<sup>32</sup> While it was a private investigation firm which gave Bardo key information which allowed him to ultimately track down Ms. Schaeffer,<sup>33</sup> the Act envisions investigators providing information only to legitimate business users or parties in litigation solely for those purposes endorsed by the Act itself.<sup>34</sup>

Where a user does not fall into any of the categories, the Act allows the release of the information if the driver gives written consent for the specific release.<sup>35</sup> This, and the permitted anti-fraud uses of driver information, appears to cover situations where

consumers pay for purchases with checks and offer a driver's license as a form of identification. The Act also provides a mechanism whereby states can permit the release and use of the personal driver information by anyone else so long as the states have set up a mechanism through which persons may choose not to have their information released.<sup>36</sup> This opt-out provision also provides for the use of the information by direct marketers. Direct marketers who obtain the personal information may resell or make additional disclosures of the information.<sup>37</sup>

## II. THE CONSTITUTIONAL DIFFICULTIES

### A. Whether the Act's Imposition of Punishment is an Unconstitutional Restraint on Speakers Under the First Amendment

#### 1. *The Imposition of Both Civil and Criminal Liability for Possession or Disclosure of Personal Information from Motor Vehicle Records*

Section 2722 of the Act imposes both civil and criminal liability for possession or disclosure of personal information from motor vehicle records.<sup>38</sup> The penalties available for disseminating motor vehicle information under the Act are similar to the prohibitions and punishments at the heart of *Landmark Communications, Inc. v. Virginia*.<sup>39</sup> At issue in *Landmark* was a Virginia statute, based on a provision of the state's constitution, that made it a crime to divulge information about official inquiries re-

<sup>23</sup> *Id.* § 2721.

<sup>24</sup> *Id.* §§ 2723, 2724.

<sup>25</sup> The listing of these uses is broad and allows disclosures for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of the Automobile Information Disclosure Act, the Motor Vehicle Information and Cost Saving Act, the National Traffic and Motor Vehicle Safety Act of 1966, the Anti-Car Theft Act of 1992, and the Clean Air Act.

*Id.* § 2725(3).

<sup>26</sup> *Id.* § 2721(b)(1).

<sup>27</sup> *Id.* § 2721(b)(3)(b).

<sup>28</sup> *Id.* § 2721(b)(6).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* § 2721(b)(7).

<sup>32</sup> *Id.* § 2721(b)(8).

<sup>33</sup> Braun & Jones, *supra* note 1.

<sup>34</sup> 18 U.S.C. § 2721(b)(8) (1994).

<sup>35</sup> *Id.* § 2721(b)(13).

<sup>36</sup> *Id.* § 2721(b)(12).

<sup>37</sup> *Id.*

<sup>38</sup> "It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title." *Id.* § 2722. Section 2723(a) provides for fines for violations of the Act. Subsection (b) allows the Attorney General to impose daily fines of \$5,000 against state departments of motor vehicles for substantial noncompliance with the Act through policy or practices. In addition to the fines, section 2724 of the Act creates a civil cause of action. "A person who knowingly obtains, discloses or uses personal information from a motor vehicle record for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court." *Id.* § 2724. The Act sets up minimum liquidated damages of \$2,500 and punitive damages are available "upon proof of wilful or reckless disregard of the law." *Id.* § 2724(b)(1)-(2).

<sup>39</sup> 435 U.S. 829 (1978).

garding the conduct of state judges.<sup>40</sup>

The *Landmark* Court considered the constitutionality of convicting and fining a newspaper reporter for reporting on a pending inquiry by the Virginia Judicial Inquiry and Review Commission ("Commission"). The Commission is vested with the power to investigate the conduct of judges. Article VI, section 10 of the Virginia Constitution provides that "[p]roceedings before the Commission shall be confidential" and under the state law "[a]ny person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor."<sup>41</sup> The Virginia statute's declaration of criminality, which closely tracks that of the Act, makes it "unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title."<sup>42</sup> The Virginia statute's confidentiality requirement ends with the filing of a complaint with the Virginia Supreme Court.<sup>43</sup>

The *Virginian Pilot* newspaper, a part of Landmark Communications, Inc., published a story in October 1975 on a pending inquiry by the Commission.<sup>44</sup> A little more than four weeks later, a grand jury indicted Landmark for violating the state law.<sup>45</sup> The trial court convicted Landmark and fined him \$500 plus prosecution costs.<sup>46</sup> The case was affirmed by the Virginia Supreme Court.<sup>47</sup> Declaring that the First Amendment would not permit criminal sanctions against persons who violated the confidentiality of the Commission proceedings when those persons were not participants, the United States Supreme Court reversed the Virginia court.<sup>48</sup>

The constitutional issue, "whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceed-

ings of the Commission," fits precisely the construction of the Act.<sup>49</sup> The Court concluded quite firmly that the First Amendment bars such an encroachment on the core values of the First Amendment and, in particular, the "free discussion of government affairs."<sup>50</sup>

The state of Virginia's attorney argued that First Amendment "protection does not extend to the publication of information 'which by Constitutional mandate is to be confidential.'"<sup>51</sup> In sustaining the conviction, the Virginia Supreme Court applied a "clear and present danger test" relying on the legislative declaration "that a clear and present danger to the orderly administration of justice would be created by divulgence of the confidential proceedings of the Commission."<sup>52</sup> The court held that the threat to the orderly administration of justice was an ample reason to sustain the constitutionality of the conviction.<sup>53</sup> The state of Virginia's attorney also argued that the disclosure of Commission proceedings before the filing of a complaint would injure the reputations of judges based on unfounded allegations and complaints.<sup>54</sup>

The United States Supreme Court acknowledged the legitimacy of the state interest in keeping the Commission's proceedings confidential, but the Court did not find those reasons sufficient to overcome the First Amendment interests at stake.<sup>55</sup> "[N]either the Commonwealth's interest in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech at issue here, even on the assumption that criminal sanctions do in fact enhance the guarantee of confidentiality."<sup>56</sup> Instead, the Court focused on the need for public discussion of government institutions and protection of criticism of judges.<sup>57</sup> In addition, the Court took note of Landmark's punishment,

<sup>40</sup> VA. CODE ANN. § 2.1-37.13 (Michie 1971).

<sup>41</sup> VA. CONST. art. VI, § 10 (1971).

<sup>42</sup> 18 U.S.C. § 2724(b)(2) (1994).

<sup>43</sup> VA. CODE ANN. § 2.1-37.13 (Michie 1971).

<sup>44</sup> *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 831 (1978).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 832.

<sup>47</sup> *Landmark Communications, Inc. v. Virginia*, 217 Va. 699, 702 (1977), *rev'd*, 435 U.S. 829 (1978).

<sup>48</sup> *Landmark*, 435 U.S. at 837-38.

<sup>49</sup> *Id.* at 837.

<sup>50</sup> *Id.* at 838.

The operation of the Virginia Commission, no less than the operation of the judicial system itself, is a matter of public interest, necessarily engaging the attention of the news media. The article published by Landmark provided

accurate factual information about a legislatively authorized inquiry pending before the Judicial Inquiry and Review Commission, and in so doing clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect.

*Id.* at 839 (citing *New York Times v. Sullivan*, 376 U.S. 254, 269-70 (1964)).

<sup>51</sup> *Id.* at 840 (quoting Brief for Appellee 17).

<sup>52</sup> *Id.* at 842 (quoting *Landmark Communications, Inc. v. Virginia*, 217 Va. 699, 708 (1977)).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 845.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 841.

<sup>57</sup> *Id.* at 838-39 (citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

even though it was not a participant in the judicial review process.<sup>58</sup> The Court also took time to closely analyze the Virginia Supreme Court's use of the "clear and present danger" test to justify the conviction and penalty in *Landmark*. Referring to a series of cases including *Bridges v. California*,<sup>59</sup> *Craig v. Harney*,<sup>60</sup> and *Wood v. Georgia*,<sup>61</sup> the Court concluded that "[w]hat emerges from these cases is the 'working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished . . . .'"<sup>62</sup>

## 2. The Link Between Stalking and Motor Vehicle Records

While stalking is a substantive evil, the link between motor vehicle records and the isolated actions of unbalanced individuals has not been firmly established, at least to the degree required under the "clear and present danger" test. While the House record on the Boxer-Moran legislation contains emotional and compelling testimony about stalking, it is mostly anecdotal.<sup>63</sup> The witnesses relate incidents to demonstrate the seriousness of the stalking problem and endorse the idea of making motor vehicle records secret as one means to fight back. Moreover, the record leaves unresolved the question of how frequently stalkers and other criminals have used motor vehicle information to locate their victims. Kristin King, a legislative assistant to Representative Moran, recalled only twenty incidents where a stalker found his victim through motor vehicle records.<sup>64</sup> In the absence of a legislative finding of a direct and immediate linkage between the release of motor vehicle information and specific violent crime, the Act falls short of the minimum required under the "clear and present danger" test.

In addition, the Act does not preclude the possibility that stalkers might be employed in any of the businesses that are granted access to motor vehicle information under the Act. There are no federal or

state measures to prevent stalkers from holding jobs with insurance companies, automobile manufacturers or tow truck businesses. Finally, as businesses have the right under the Act to obtain driver information in the normal course of dealing with customers, stalkers employed in the retail and service fields will continue to have access to the information when consumers and potential victims pay by check and offer their driver's licenses as identification.

Efforts at the state level, particularly in California, to restrict access to other government information, such as voter registration records, point to the existence of alternate means to obtain personal information about persons from government records.<sup>65</sup> The exclusion of a single category of records will not achieve the government interest that is central to the Act.

## 3. Driver Information and Public Speech About Government

Opponents of the Act point to instances where the access to motor vehicle records has provided significant information about the process and efficiency of government. The news media have brought to the public's attention failures on the part of state agencies to keep drivers who have been convicted of alcohol-related offenses off the roads. For example, the *Greensboro News & Record* (North Carolina) reported in October 1994 that newspapers in Georgia and Ohio used motor vehicle databases to identify persons who had been convicted a dozen or more times of driving under the influence of alcohol.<sup>66</sup> Access to motor vehicle records is an essential part of the public's ability to scrutinize the operation of government, a key part of the *Landmark* decision. As the Court there maintained:

[t]he article published by *Landmark* provided accurate factual information about a legislatively authorized inquiry pending before the Judicial Inquiry Commission, and in so doing clearly served those interests in public scrutiny and discussion of governmental affairs which the

<sup>58</sup> *Id.* at 836-37.

<sup>59</sup> 314 U.S. 252 (1941).

<sup>60</sup> 331 U.S. 367 (1947).

<sup>61</sup> 370 U.S. 375 (1962).

<sup>62</sup> *Landmark*, 435 U.S. at 845 (citing *Bridges v. California*, 314 U.S. 252, 263 (1941)).

<sup>63</sup> See discussion *supra* part I.A.

<sup>64</sup> Franklin, *supra* note 21.

<sup>65</sup> In September 1994, California Governor Pete Wilson signed into law a bill aimed at ensuring the privacy of information in voter registration records. The law restricts access to addresses and telephone numbers to defined categories including

the news media, scholars and politicians. See CAL. ELECTIONS CODE §§ 18110, 29208 (Deering 1995); CAL. ELECTIONS CODE § 6254.4 (Deering 1995).

<sup>66</sup> Lex Alexander, *Computers Make Officials Worry About Privacy*, GREENSBORO NEWS & REC., Oct. 8, 1994, at D5. The *Minneapolis Star-Tribune's* discovery that the FAA was ignorant of the fact that 41 commercial pilots had lost their driver's licenses goes to the heart of public discussion about the conduct of government operations. The problem extends from the state level, where the license revocations occurred, to the federal government. See Franklin, *supra* note 21.

First Amendment was adopted to protect.<sup>67</sup>

The Franklin article suggests that the Act might prevent people from trying to identify drug dealers operating in their neighborhoods, persons who witness hit-and-run accidents and others who see dangerous driving which endangers children.<sup>68</sup> The *Greensboro News & Record* quoted North Carolina officials with Mothers Against Drunk Driving who expressed concerns about the group's ability to identify chronic drunk drivers or to provide courts with supplemental information about the drunk driving histories of defendants.<sup>69</sup>

The Act specifically excludes personal information on a driver's accidents, violations, and whether that driver has a current or valid license.<sup>70</sup> Despite this limited access, the Act does not provide for the level of public accountability achieved by current access to motor vehicle records.<sup>71</sup> Thus, closed off is an important First Amendment function, and the public is denied needed information about the efficient operation of government.

The Act would also have the effect of disparate protection for some persons whose personal information falls under the Act's exclusions. A would-be stalker could claim a minor accident on private property and use a license plate to get personal information about a potential victim.<sup>72</sup> A stalker might find a driver who was involved in an accident or who had a moving violation. Under the Act, a department of motor vehicles might decide to release a driver's information under the exemption for information regarding "motor vehicle or driver safety."<sup>73</sup> In such a case, a driver would lose the Act's protection for having been caught driving under the influence or being involved in an accident, notwithstanding fault.

It is difficult to overstate the significance of motor vehicle information. The United States contains a mobile society that relies significantly on the automobile.<sup>74</sup> American youth view getting a driver's license as the rite of passage into adulthood.<sup>75</sup> Driving privi-

leges take primacy over the right to vote, illustrated by the fact that there are 190 million persons of voting-age in America and only about 120 million actually registered.<sup>76</sup> There are, by comparison, about 168 million licensed drivers in the United States.<sup>77</sup> The primacy of driving rights over voter rights helped fuel passage of the National Voter Registration Act of 1993, also known as the "Motor Voter Law."<sup>78</sup> The law was designed to facilitate voter registration by allowing persons to register to vote when they renewed their drivers licenses.<sup>79</sup>

Without access to such information, society loses the opportunity to gauge for itself the effectiveness of government in its attempt to keep dangerous drivers off the road. In addition, it does not provide society with the opportunity to see just how fair the justice system is in its treatment of wealthy versus poor or majority versus minority. Also, information from motor vehicle and driver records provides a snapshot of American society which is unavailable from any other single source. Finally, the use of driver information provides a widely available and reliable means of identification of individuals. Locking this information away from the public in return for a false feeling of security is a tradeoff that runs counter to good public policy and First Amendment principles.

## B. The Right to Receive Information

The laundry list of public interest stories generated by motor vehicle records raises a second, but equally significant First Amendment issue based on the right of the public to access information. In 1976, the United States Supreme Court recognized the coexisting right to receive information with the right to disseminate information in *Virginia Pharmacy Board v. Virginia Consumer Council*.<sup>80</sup> The Court examined a Virginia statute that made the advertising of prescription drug prices unprofessional conduct.<sup>81</sup> A consumer group challenged the statute,

<sup>67</sup> *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978).

<sup>68</sup> Franklin, *supra* note 21.

<sup>69</sup> Alexander, *supra* note 66.

<sup>70</sup> 18 U.S.C. § 2721(b) (1994).

<sup>71</sup> See Franklin, *supra* note 21 and accompanying text.

<sup>72</sup> However, the law is unclear in this respect. It will be up to the courts to determine whether this is permissible.

<sup>73</sup> 18 U.S.C. § 2721(b).

<sup>74</sup> See, e.g., Marty Racine, *Lifestyle Happy Wanderers: Carrying Their Homes with Them Like Turtles, Full-Time RVers Love Their Life on the Road*, *HOUSTON CHRON.*, Mar. 31, 1996, at 1; Mark Savage, *SS '96 Auto Show*, *MILWAUKEE J.*

& *SENTINEL*, Feb. 23, 1996, at 1.

<sup>75</sup> See, e.g., Anita & Paul Lienert, *Transportation Shifting Gears*, *CHI. TRIB.*, Mar. 17, 1996, at 1.

<sup>76</sup> *Registrations to Vote Are at Record Pace*, *SALT LAKE TRIB.*, Sept. 5, 1995, at A7.

<sup>77</sup> *Man on Moon Needs Wheels*, *SALT LAKE TRIB.*, Oct. 2, 1993, at A6.

<sup>78</sup> National Voter Registration Act of 1993, Pub. L. No. 103-31, 42 U.S.C. § 1973gg-3 (1994).

<sup>79</sup> *Id.*

<sup>80</sup> 425 U.S. 748 (1976).

<sup>81</sup> *Id.* at 750.

which was previously attacked unsuccessfully by pharmacists themselves.<sup>82</sup> In affirming a federal district court ruling that the statute was void, the Court raised the question of the rights of the Virginia Consumer Council as consumers of drug pricing information.<sup>83</sup> The Court noted that "[f]reedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both."<sup>84</sup>

In addition, the Court noted that its prior cases, including *Lamont v. Postmaster General*,<sup>85</sup> and *Procurier v. Martinez*,<sup>86</sup> recognized the rights of audiences.<sup>87</sup> Also, referring to *Kleindienst v. Mandel*,<sup>88</sup> the Court stated, "[w]e acknowledged that this Court has referred to a First Amendment right to 'receive information and ideas,' and that freedom of speech 'necessarily protects the right to receive.'"<sup>89</sup> But the Court has not gone so far as to enunciate a right to gather information and has specifically refused to endorse such a proposition, with the exception of criminal trials,<sup>90</sup> in a series of cases dealing with rights of travel and rights of access.<sup>91</sup> Balancing a purported important governmental interest against a First Amendment value, the Act fails to carry its burden of providing that interest.<sup>92</sup> In addition, the penalties for non-participants and the recipients of motor vehicle information implicates the First Amendment right to receive information.

The Act eliminates the public's right to receive information about the nature of government in the important area of driver regulation. For example, a news story about a state's failure to regulate drivers who have been convicted of driving while intoxicated or one discussing the ability of the public to match up lists of convicted felons with the names of school bus drivers provides the voting public with information on which to base decisions about the efficacy and desirability of government policies. Such information might well be found to enjoy the same level of importance as the public's right to know the price of, say, Acromycin tablets (an antibiotic) at different

pharmacies in Virginia. In this respect, the result of implementation of the Act appears to be a world where reliance must be placed on the assumption that state agencies are self-regulating, and that, as a result, they are operating efficiently and appropriately in carrying out their functions. As Chief Justice Warren Burger wrote in *Richmond Newspapers v. Virginia*,<sup>93</sup> a case relating to access at criminal trials, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."<sup>94</sup>

The Act includes a provision that may grant non-enumerated individuals or entities the right to obtain and disclose motor vehicle information, but only in the context of law enforcement or other state action. Section 2721(b)(1) allows access to motor vehicle records "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions."<sup>95</sup> The question which arises from this language is the degree to which private persons or entities must have the sanction of government agencies or the courts to examine driving records. If there is no threshold, one could imagine a Robert Bardo seeking motor vehicle information about a Rebecca Schaeffer for the ostensible purpose of reporting her driving to a government agency.

Even more significant is the role of the press in such a statutory scheme. The right of media to obtain access to motor vehicle records under the Act would be limited to their participation in law enforcement and prosecutorial efforts "acting on behalf of a Federal, State, or local agency in carrying out its functions."<sup>96</sup> The media indicated its disdain for the role government agents or informants play in *Branzburg v. Hayes*,<sup>97</sup> decided together with *In re Pappas*<sup>98</sup> and *United States v. Caldwell*.<sup>99</sup> The three cases involved demands on three reporters by one federal grand jury and two state grand juries to disclose confidential information they obtained from

<sup>82</sup> *Id.* at 753.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 756.

<sup>85</sup> 381 U.S. 301 (1965).

<sup>86</sup> 416 U.S. 396 (overruled by *Thornburgh v. Abott*, 490 U.S. 401, 413-14 (1989)).

<sup>87</sup> *Virginia Bd. of Pharmacy*, 425 U.S. at 756.

<sup>88</sup> 408 U.S. 753 (1972).

<sup>89</sup> *Virginia Bd. of Pharmacy*, 425 U.S. at 757 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972)).

<sup>90</sup> See *Press-Enterprise Co. v. Superior Court of California for County of Riverside*, 478 U.S. 1, 15 (1986).

<sup>91</sup> See *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965); *Regan v. Wald*, 468 U.S. 222, 242 (1984).

<sup>92</sup> See *Zemel*, 381 U.S. at 1; *Pell v. Procurier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Houchins v. KQED*, 438 U.S. 1 (1978).

<sup>93</sup> 448 U.S. 555 (1980).

<sup>94</sup> *Id.* at 572-73.

<sup>95</sup> 18 U.S.C. § 2721(b) (1994) (emphasis added).

<sup>96</sup> 18 U.S.C. § 2721(b)(1) (1994).

<sup>97</sup> 408 U.S. 665 (1972).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*



sources about alleged criminal activity.<sup>100</sup> Although the United States Supreme Court rejected an out-right privilege for reporters in *Branzburg*, subsequent decisions in Federal Appeals Courts allowed for considerable protection for the media.<sup>101</sup>

In addition, requiring that persons or entities receiving and disclosing motor vehicle information to do so on behalf of government agencies undermines the traditional role of the press in monitoring the functions of government and government officials.<sup>102</sup> More broadly, the denial of such information and the types of stories that have been generated from such information poses a generalized threat to First Amendment principles. As the Supreme Court said in *New York Times v. Sullivan*,<sup>103</sup>

[t]he general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. The maintenance of the opportunity for free political discussion to the end that government will be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principal of our constitutional system."<sup>104</sup>

### C. Disparate Treatment of Political and Commercial Speech

The Act grants to certain categories of businesses immediate access to motor vehicle records.<sup>105</sup> The list covers motor vehicle market research, business surveys, towing service operators, businesses seeking to verify the accuracy of information provided by customers and private investigators who use the information for permitted purposes.<sup>106</sup> While the Act provides that the information given to commercial users is to be used only for those enumerated pur-

poses, it is clear that there are no practical safeguards available to ensure the information will only be used for those purposes.

The general public, including the media, may have access to the same information, but only if state legislatures pass laws creating opt-out provisions.<sup>107</sup> Opt-out provisions would provide persons an opportunity to request that the state not release their driver information.<sup>108</sup> The requirement that the public obtain legislative permission puts the commercial user in a preferred position over speakers and audiences interested in issues falling under the umbrella of political speech.

It is for these two reasons the Act faces a challenge under principles enunciated in *Smith v. Daily Mail*.<sup>109</sup> In *Smith*, the Daily Mail Publishing Corp., operating the *Charleston Daily Gazette* (West Virginia), published the name of a fourteen-year-old suspected in the murder of another teen.<sup>110</sup> The state of West Virginia indicted the newspaper for publishing the name of the juvenile suspect in violation of Section 49-7-3 of the West Virginia Code that read in part, "nor shall the name of any child, in connection with any proceedings under this chapter be published in any newspaper without a written order of the court."<sup>111</sup> The statute made such publication a misdemeanor.<sup>112</sup>

The publishing company sought a writ of prohibition arguing that the statute was unconstitutional as a prior restraint and an abridgement of the freedom of the press.<sup>113</sup> The West Virginia Supreme Court granted the writ of prohibition and the United States Supreme Court upheld the West Virginia Court's decision.<sup>114</sup> The United States Supreme Court did not reach the issue of whether the statute constituted a prior restraint.<sup>115</sup> Still, the Court noted the difficulty facing any regulation that operates as a prior restraint.<sup>116</sup>

Guided by First Amendment principles, the Court

<sup>100</sup> *Id.* at 665-79. In these cases, the reporters fought grand jury attempts to obtain confidential information they gathered in preparation to write stories: *Branzburg* dealt with information about the manufacture of hashish; and both *Pappas* and *Caldwell* dealt with information about activities of the Black Panthers. *Id.*

<sup>101</sup> *See, e.g.*, *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) ("Shoen I"); *Shoen v. Shoen*, 48 F.3d 412, 414 (9th Cir. 1995) ("Shoen II").

<sup>102</sup> *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 1957); *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

<sup>105</sup> 18 U.S.C. § 2721(b) (1994).

<sup>106</sup> *Id.*

<sup>107</sup> Judith Beth Prowda, *Privacy and Security of Data*, 64 *FORDHAM L. REV.* 738, 754 (1995).

<sup>108</sup> Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 *IOWA L. REV.* 553, 612 (1995).

<sup>109</sup> 443 U.S. 97, 99 (1979).

<sup>110</sup> *Id.* at 99.

<sup>111</sup> W.VA. CODE ANN. § 49-7-3 (Michie 1976).

<sup>112</sup> *Id.*

<sup>113</sup> *Smith*, 443 U.S. at 100.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 102 (quoting *Landmark Communications v. Virginia*, 435 U.S. 829 (1978)).

<sup>116</sup> *Id.* 101-02.

Whether we view the statute as a prior restraint or as a



determined that West Virginia sought to protect the anonymity of juvenile offenders.<sup>117</sup> Yet, while the statute forbade the public identification of juvenile offenders by newspapers,<sup>118</sup> it remained silent about publication by any other means. "In this very case, three radio stations announced the alleged assailant's name before the Daily Mail decided to publish it. Thus, even assuming the statute served a state interest of the highest order, it does not accomplish its stated purpose."<sup>119</sup>

The free dissemination of motor vehicle information to enumerated categories of entities, such as private investigators, creates similar risk that is associated with the free flow of that information in many states.<sup>120</sup> In addition, the Act permits the entities in the enumerated categories to resell the information for their permitted purposes.<sup>121</sup> Under the strict scrutiny standard required of government regulation of speech, the Act fails to achieve the clear purpose of the statute.

The United States Supreme Court in *Smith* declined to address the issue of the denial of equal protection with respect to the treatment of newspapers and other segments of the mass media.<sup>122</sup> Nevertheless, it remains a significant issue when considered in light of the unequal treatment between commercial users and all others, including the media.<sup>123</sup>

While the courts recognize that commercial speech enjoys protection under the First Amendment, that level of protection has been less than that accorded political speech.<sup>124</sup> In extending First Amendment protection to prescription drug advertising in *Virginia Pharmacy*, the court mentioned in a footnote the significant differences between pure commercial speech, which merely proposes transactions, and political speech.<sup>125</sup> Even recognizing speech protection

for commercial speech, those protection exist at levels that may permissively fall below those for political speech. Therefore, the grant of preference to commercial users of motor vehicle information for commercial purposes, including motor vehicle satisfaction surveys or insurance underwriting, falls well below the important First Amendment issues raised with respect to government conduct that is reported on by the media for the purpose of generating public discussion.

#### D. Overbreadth in Government Regulation of Speech

The restriction of the right of the public and media to have access to and to disclose driver information also raises the issue of whether the Act would pass muster under the test laid out by the Supreme Court in *United States v. O'Brien*.<sup>126</sup> That case involved David Paul O'Brien's appeal of his conviction for burning his Selective Service draft card.<sup>127</sup> O'Brien argued that the statute making it a crime to destroy or mutilate a draft card was an unconstitutional abridgement of his rights to symbolic speech protected by the First Amendment.<sup>128</sup> While the Court upheld his conviction in the face of O'Brien's argument, it also laid out a multi-part test for determining whether statutes infringe on free speech.<sup>129</sup>

The Court noted that the nature of the government interest was high, in fact, "compelling," "substantial," "paramount" and "subordinating."<sup>130</sup> The Court referred to several cases involving government regulation of speech<sup>131</sup> such as *NAACP v. Button*<sup>132</sup> where it pointed out that "[t]he decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the

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penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity. Prior restraints have been accorded the most exacting scrutiny in previous cases.

*Id.*

<sup>117</sup> *Id.* at 104.

<sup>118</sup> W.VA. CODE ANN. § 49-7-3 (Michie 1976).

<sup>119</sup> *Smith*, 443 U.S. at 105.

<sup>120</sup> 18 U.S.C. § 2721(b)(1-14) (1994).

<sup>121</sup> *Id.* § 2721(c).

<sup>122</sup> *Smith*, 443 U.S. at 106 n.4.

<sup>123</sup> *Id.* at 104-05; see also W.VA. CODE ANN. § 49-7-3 (1995).

<sup>124</sup> *Virginia State Bd. of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976).

<sup>125</sup> "Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different

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degree of protection is necessary to insure that the flow of truthful and legitimate information is unimpaired." *Id.* at 771-72 n.24.

<sup>126</sup> 391 U.S. 367 (1968).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 370.

<sup>129</sup> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*Id.* at 377.

<sup>130</sup> *Id.* at 376-77.

<sup>131</sup> *Id.* at 376-77 nn.22-27.

<sup>132</sup> 371 U.S. 415 (1963).

State's constitutional power to regulate can justify limiting First Amendment freedoms."<sup>133</sup> In *Button*, the Court found a statute barring the encouragement of lawsuits and the recommendation of particular attorneys to fall short of a compelling nature.<sup>134</sup> "[T]he State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed."<sup>135</sup>

#### E. A Substantial Governmental Interest

The Act fails to meet both substantial governmental interest and the narrowly tailored requirements. The record fails to show a substantial number of instances in which there is a direct, causal relationship between the release of motor vehicle records and a paramount interest on the part of the federal government. Although anecdotal information points to the occasional use of motor vehicle records by stalkers, there is no clear-cut pattern. Even if such a pattern might be discerned, the availability of other sources of personal information still available from state and local governments makes the restrictions on this one class of records a mere hindrance to a determined pursuer.

In addition, the protective scheme has many holes. The breadth of the list of enumerated users of the driver information, and the absence of controls over their conduct, makes the restriction on the access and use of the information ineffective. Private investigation firms have access to motor vehicle information under the Act. Bardo obtained information about his victim, Schaeffer, from a private investigation firm, and the story of his deception demonstrates the unworkability of the Act. In the Schaeffer murder, the *Los Angeles Times* reported Bardo went to the A.A. Investigators detective agency in Tucson on June 1, 1988.<sup>136</sup> He carried with him several letters from Schaeffer and a publicity photo. The *Times* quoted an unnamed detective agency official who said that Bardo indicated that "he needed to get in touch with an old friend."<sup>137</sup>

Because Bardo had Tucson roots (a permanent address, employment, lived with his parents) the agency agreed to look for Schaeffer. Considering the lengths to which Bardo was willing to go to find

Schaeffer, it is all too conceivable that stalkers will pass themselves off as agents or owners of legitimate businesses to get the information from state departments of motor vehicles. Failing that, they, like Bardo, might employ private investigators to get the information they need. The minor violation of the law they would commit to obtain the information is insignificant compared with the violations they commit as they stalk, confront, assault and kill their victims. In addition, the grant of access to tow truck operators, insurance companies, car manufacturers and researchers, presupposes that no stalker will ever be so employed or be able to get access to the motor vehicle information through fraud or trickery.

In light of the Act's inability to further its own stated purpose, the statute fails the first part of the *O'Brien* test. While the Act may not have as its ultimate goal the suppression of free expression, the Act restricts First Amendment freedoms to a degree greater than that allowed under *O'Brien* because the furtherance of the interest is not met by the Act itself.

### III. CONCLUSION

While the right of the people to be secure in their own homes is important, a generalized fear cannot justify the imposition of restrictions on information held by government or restrictions on speakers. Supreme Court Justice Louis Brandeis wrote compellingly, in *Whitney v. People of the State of California*,<sup>138</sup> of the dangers created when people give in to unreasoned fear.<sup>139</sup> For example, Anita Whitney was prosecuted and convicted for her participation in the activities of the Communist Party in California.<sup>140</sup> The fear of the Communist ideology and philosophy was such that the state sought to bury it under criminal statutes. While Communism posed a degree of risk, the harm to the First Amendment was immeasurably greater.

The Act was created to help victims of the crime of stalking by denying criminals a means of identifying and locating victims. For those whose well being and lives are at stake, the interest is compelling. But the number of persons involved is small. The interest to be protected does not outweigh the interests protected by the First Amendment. In addition, the Act

<sup>133</sup> *Id.* at 438.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 444.

<sup>136</sup> Braun & Jones, *supra* note 1, at A1.

<sup>137</sup> *Id.*

<sup>138</sup> 274 U.S. 357 (1927).

<sup>139</sup> *Id.* at 376. Brandeis wrote: "[f]ear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. . . . To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced." *Id.*

<sup>140</sup> *Id.*

provides scant protection permitting access by numerous categories of commercial users who are free to use or misuse the motor vehicle information, subject only to relatively minor sanctions.

On the other hand, the denial of access to motor vehicle records forecloses significant discussion of the operations of government. The failure of government to keep drivers with records of drunk driving arrests off the road is a matter of public concern in light of the numbers of highway deaths attributed to drinking and driving. In addition, the use of motor vehicle records to identify persons and institutions and to track their activities has value to the public, especially when conduct varies significantly from public positions. For example, prosecutors and judges who grant preferential treatment to friends, families and colleagues are properly of concern to voters who pass judgment on them. Also, a news article about a charity spending thousands of dollars on a luxury car for its president at the same time it sought money for charitable activities, gives the public important

information.

The right of the people, including the media, to talk about the operation of government and the public to hear about those operations, outweighs the well-intentioned, though unconstitutional, effort to provide a sense of security for those at risk from stalkers. At an even more basic level, the Act provides an illusory protection because there are no guarantees that stalkers will not have access to the information, either as employees or through fraud. The criminal sanctions imposed provide little deterrent for stalkers whose fixations lead them to commit violent acts against their victims. There are any number of other sources of information available. But even if the government could identify all the sources, it would still be a violation of the rights protected by the First Amendment for both speakers and the audience to lock that information away. The supporters of the Act fear stalkers and appear willing to burn the First Amendment in order to quash that fear.

